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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 883

ATLANTIC COAST LINE RAILROAD COMPANY, BOSTON AND MAINE CORPORATION and DES MOINES UNION RAILWAY COMPANY, *Petitioners,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, *Respondent.*

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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We believe we have demonstrated in the petition that the issues as to whether, and in what circumstances, multi-employer bargaining ("national handling") may be required under the Railway Labor Act are important and that the decision below with respect to those issues is erroneous. Respondent does not deny that the issues are important both in terms of the immediate case and in terms of the future administration of the Railway Labor Act. Respondent does contend that the decision below is correct (Opposition, at 15-23), but it cites no authority for its position in that regard and there is none. In these circumstances, we submit that this Court should decide the important issues thus presented upon the basis of full briefs and oral argument.

Apparently in recognition of the doubtful nature of the

decision below with respect to multi-employer bargaining under the Railway Labor Act, respondent in its Opposition primarily relies upon contentions which were rejected by that court. We shall show that those contentions are without substance, but even if it were otherwise that would not detract from the need for review of the decision below by this Court. That decision was based upon the lower court's ruling that multi-employer bargaining is not required by the Railway Labor Act under the circumstances, which ruling will remain as the latest interpretation of the Railway Labor Act in that regard unless reviewed by this Court. If the court below may also have erred with respect to other substantial issues, as respondent contends, the need for review by this Court becomes even more apparent. Any such errors should be corrected, just as should the error with respect to the circumstances in which multi-employer bargaining is required by the Railway Labor Act. In fact, however, the court below did not err in rejecting respondent's contentions.

1. Respondent's first such contention (Opposition, at 10-13) is that petitioners were barred by the doctrine of *res judicata* from raising the multi-employer bargaining issues in this case. In the courts below, respondent based its *res judicata* contention upon an argument that petitioners should have raised these issues in a motion for supplemental relief filed on April 12, 1966 in *Akron & Barberton Belt Railroad Company* v. *Brotherhood of Railroad Trainmen*, 254 F. Supp. 306 (D. D.C., 1966), affirmed in part and reversed in part, 55 CCH Labor Cases ¶ 11,912, 56 CCH Labor Cases ¶ 12,095 (D.C. Cir., 1967), petitions for certiorari pending, Nos. 861, 862, 863. But, as the court below stated in rejecting that contention (Pet., App. B, at 22a-23a):

> "The carriers' motion for supplemental relief was based on the District Court's reservation of jurisdiction

> to construe and effectuate its judgment pronouncing the 1965 notices premature. The carriers sought a declaration that genuine conferences had not yet taken place. They did not have an obligation at that time to expand the relief they were seeking, even though the BRT was on record as opposing the demand for national handling, for this demand by the carriers was conditioned on the failure of local conferences, and it was not yet clear that genuine, good faith local negotiations had been tried and exhausted. Added to the lack of ripeness at that time, there is a serious question about the propriety of introducing this issue in a motion for relief at the foot of the earlier decree, which was directed at very different questions. In these circumstances, we decline to dispose of the case on *res judicata* grounds."

In short, the issue raised on the motion for supplemental relief in the *Akron & Barberton Belt* case was whether the initial conferences on the individual properties with respect to the Section 6 notices served in 1965 had to be held after the expiration of Award 282, in view of the ruling by the District Court that such notices were premature and did not become effective until January 26, 1966—the day after the expiration of Award 282. Under the established practice in the railroad industry, national handling does not take place until after the initial conferences on the individual properties have been had (and then only if the dispute is not settled in such conferences). JA 72-73, 190. Mr. Luna, respondent's president, was among those who so testified (JA 208-209), and respondent so admitted in its Answer to paragraph 5 of the Complaint (JA 3-4, 35-36). Thus, the carriers requested national handling only in the event the dispute was not settled in the initial conferences on the individual properties. JA 11-12, 29-30, 39-40. Since the

initial conferences had not taken place when the motion for supplemental relief was filed in the *Akron & Barberton Belt* case, there could be no certainty that national handling would be refused (or that the dispute would not be settled in the initial conferences), so that no concrete issue with respect to national handling existed at that time to present to the court.

Moreover, the motion for supplemental relief was filed pursuant to a provision in the judgment in the *Akron & Barberton Belt* case reserving "jurisdiction for the purpose of enabling any of the parties to this proceeding . . . to apply to this Court at any time for such further orders as may be necessary or appropriate for the construction, carrying out or enforcement of this Judgment." See the Joint Appendix in Nos. 20,229 and 20,249 below, which is part of the record before this Court in Nos. 861, 862 and 863, at page 190. The issues raised in the motion involved the interpretation and enforcement of a provision in that judgment declaring the 1965 Section 6 notices to be premature and the service of such notices to be effective only after the expiration of Award 282. *Id.*, at 185-191. The national handling issues, on the other hand, are not dependent in any way upon the interpretation or enforcement of that judgment. Consequently, even if those issues had existed in concrete form at the time they could not appropriately have been raised in the motion for supplemental relief.

Respondent does not contend in this Court that the court below erred in rejecting the *res judicata* contention on these grounds. Rather, as we understand its argument, respondent now contends that the court below actually decided the national handling issues adversely to petitioners in the *Akron & Barberton Belt* case. Since those issues were not raised in that case, we think it obvious that they were not

decided therein, and the court below plainly did not understand them to have been so decided.

In the *Akron & Barberton Belt* case, the Court of Appeals did reverse the holding by the District Court that the 1965 Section 6 notices were premature so that the initial conferences had to be held after those notices became effective following expiration of the Award. The carriers have requested this Court to review that holding, in No. 863. In the course of so holding, the Court of Appeals stated that the "carriers have forsaken their right to insist on conferences" by reason of their refusal to bargain over the Section 6 notices prior to expiration of the Award. See Appendix E to the Petition in No. 863, at 54a. But such initial conferences merely commence the procedures provided by the Railway Labor Act for the resolution of major disputes created by Section 6 notices, they do not exhaust those procedures. The Act also requires mediation by the National Mediation Board, a proffer of voluntary arbitration and, in the discretion of the President, an investigation by an emergency board. 45 U.S.C. §§155-160. See, *e.g., Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 724-725 (1945). As we have related, it is in the course of such further procedures, rather than in the initial conferences, that national handling normally occurs and was requested here. The Court of Appeals did not hold or suggest, in the *Akron & Barberton Belt* case, "that *no* further negotiations, of any kind, were required on these Section 6 notices," as respondent states (Opposition, at 13). Rather, that court stated that where the initial conferences are "frustrated, one side to the dispute can move to the next tier of procedures;" *i.e.,* mediation by the National Mediation Board. See Appendix E to Petition in No. 863, at 54a. Of course, the purpose of such mediation is to aid the parties in their further negotiations. We note, moreover, that the initial

conferences on the individual properties did take place between petitioners and respondent following expiration of the Award, whether or not respondent could have elected to proceed directly to mediation. Respondent so concedes (Opposition, at 5-6).

2. Respondent next contends (Opposition, at 13-14) that petitioners are estopped from raising the national handling issues, apparently on the ground that they did not "object to the National Mediation Board's assertion of jurisdiction to mediate the separate disputes." To the contrary, petitioners and the other carriers asserted their view in the very telegram to which respondent refers (Opposition, at 14; JA 396-397) that national handling of the dispute is required and should be had, after the initial conferences on the individual properties failed to resolve the dispute. This is conceded by respondent in its Statement of the Case (Opposition, at 6), where it notes that the carriers' representative, in that telegram, "stated that mediation of all the crew-consist disputes should be handled on a national basis . . . ." As we have noted in the petition (fn. 7, at 10), the National Mediation Board sought to persuade respondent to agree to national negotiations, and arranged for a series of "test negotiations" whereby mediation would be had on several carriers with the understanding that the national representatives of the parties would meet thereafter and attempt to settle the entire dispute, which understanding was frustrated when respondent's president subsequently refused to attend such a meeting. In view of these facts, it is not surprising that the Court of Appeals deemed an express discussion of respondent's estoppel argument to be unnecessary.

3. Respondent's argument (Opposition, at 15-23) in support of the holding below that multi-employer bargaining is not required by the Railway Labor Act is refuted, we be-

lieve, at pp. 29-39 of the petition. We think it obvious from their face that Section 1 Sixth and Section 2 Second are concerned "with the *manner* in which bargaining is conducted," as well as "with the right of the parties to be represented by representatives of their own choice." See Opposition, at 17. Moreover, as we note in the petition (p. 30), the right of the carriers interested in a dispute to designate a joint representative to bargain on their behalf would be virtually nullified if a union may insist that the joint representative bargain on behalf of only one carrier at a time rather than behalf of all the carriers he jointly represents, as respondent contends may be done. The *Detroit Newspaper* case, to which respondent refers (Opposition, at 17), arose under the Labor-Management Relations Act, which does not contain a provision similar to those in Sections 1 Sixth and 2 Second of the Railway Labor Act whereby the employers are given an express right to designate a joint representative to bargain jointly on behalf of all of them.

It is not true, of course, that crew-consist disputes have never been disposed of through national handling, as respondent asserts (Opposition, at 20). The record discloses, as we note in the petition (pp. 9, 37-38), that such disputes were successfully disposed of by agreement with respect to Section 6 notices served in 1941, 1944, 1945, 1947 and 1956, and such a dispute was disposed of pursuant to P.L. 88-108 with respect to the 1959-1960 Section 6 notices. Respondent's assertion (Opposition, at 21) that "there have been many instances in which one of the parties has refused to bargain a dispute on a national basis when the other side requested it so to do" also is contrary to the record in this case,[1] although such instances may well become frequent in

[1] Respondent's purported "illustration" (Opposition, at 21-23) of those "many instances"—the so-called Union Shop Case—is the only instance shown by the record in which the railroads generally took the position that national handling was not required. As is shown in the petition (pp.

the future, if the decision below is allowed to stand. See the petition, at 8-9.

4. In addition to its contention that the court below correctly held that multi-employer bargaining over the 1965 Section 6 notices is not required for the reasons stated by that court in its opinion, respondent contends that it had lawfully withdrawn from such bargaining (Opposition, at 23-25). In our view, the position of the National Labor Relations Board that any obligation to engage in multi-employer bargaining under the Labor-Management Relations Act may be terminated by a timely and unequivocal withdrawal from such bargaining is not valid under the Railway Labor Act, whatever may be its validity under the Labor-Management Relations Act. But even if such withdrawals should be permitted under the Railway Labor Act, respondent did not withdraw from national handling in either a timely or an unequivocal fashion, as we note in the petition (pp. 33-34). It did not notify the carriers of such a withdrawal in its Section 6 notices (JA 26-28), and the "public pronouncement" some year and a half earlier (Opposition, at 24) consisted of an item in respondent's newspaper and a resolution of its national convention. Under the Labor-Management Relations Act, adequate "written" notice is required. *Retail Associates, Inc.*, 120 N.L.R.B. 388, 395 (1958). Moreover, respondent did not unequivocally "withdraw" from all national handling, but continued to participate in national handling of other issues where that method of bargaining was deemed to be more

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25-26, 35), Emergency Board No. 98 agreed with the contrary argument by the unions involved in that dispute, and the eastern carriers then entered into a concerted agreement which formed the pattern for separate agreements entered into by the other carriers (Pet., fn. 5, at 9). On one other occasion, the carriers were persuaded by the National Mediation Board to participate in national handling after initially refusing to do so (Pet., fn. 5, at 9). Prior to the instant dispute, no union refused to participate in national handling when requested to do so (Pet., at 8-9).

favorable to respondent (JA 73-75, 80-81, 223-225, 234-236, 387-388).

5. For the reasons stated above and in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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